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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1973

No. 73-487

JAMES WESLEY BREWER, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

Petition For a Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

---

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Table of Contents

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 6

1. The decision below is in conflict with the decisions of this Court and with the Decisions of other Courts of Appeals 7

Conclusion 11

Appendix (Opinion and Judgment of Court of Appeals) .. 12

CITATIONS

United States Code, Title 23, Section 7203 2

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, L.Ed. 694 6

United States v. Dickerson, 413 F.2d 1111 (7 Cir. 1969) 7

Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503 8

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The petitioner, James Wesley Brewer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceding on July 27, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No written opinion was rendered by the District Court for the Western District of Oklahoma.

JURISDICTION

The judgment for the Court of Appeals for the Tenth Circuit was entered on July 27, 1973. A timely petition for rehearing was filed by petitioner and denied on August 17, 1973, and this petition for certiorari is being filed within thirty days of that date. The Government filed a Petition for Rehearing as to Count Four, which the United States Court of Appeals for the Tenth Circuit denied on September 10, 1973. This court's jurisdiction is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

1. Are the *Miranda* warnings required to be given a taxpayer by the Special Criminal Agent at the inception of the first contact with the taxpayer once the case has been transferred to the Criminal Intelligence Division of the Internal Revenue Service even though the taxpayer is not in actual physical custody?

2. Must the trial court find that a defendant waived his rights knowingly and intelligently before it admits his statements into evidence?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 23 Section 7203 provides:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or suppy any information, who willfully fails to pay such estimated tax or tax, make such return, keep

such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalities provided by law, be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

The information filed against the defendant charged in Count One as follows:

> That during the calendar year 1967, James Wesley Brewer who was a resident of the City of Oklahoma City, State of Oklahoma, had an received a gross income in excess of $600.00; that by reason of such income he was required by law, following the close of the calendar year 1967 and on or before April 15, 1968, to make an income tax return to the District Director of the Internal Revenue for the Western District of Oklahoma, at Oklahoma City, in the Western District of Oklahoma, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did willfully and knowingly fail to make said income tax return to the said Director of Internal Revenue, or to any other proper officer of the United States.
>
> In violation of Section 7203, Internal Revenue Code; 26 U. S. C., Section 7203.

Counts Two and Three of the information were identical to Count One except that they were based on the year 1968 and 1969. Count Four is identical to Count One, Two and Three, except the gross income had and received by the defendant was alleged to be in excess of $2300.00. The defendant was

tried and convicted before a jury of four counts of violating Title 26 U. S. C., Section 7203.

The United States Court of Appeals for the Tenth Circuit in their opinion dated July 27, 1973, generally affirmed the judgment of the lower court, but reversed as to the conviction on Count Four upon the grounds that the evidence was insufficient.

A substantial part of the evidence on which the conviction rests on Counts One, Two, and Three, consists of statements obtained from petitioner by a Special Internal Revenue Agent during a question and answer interview conducted in a conference room in the Federal Courthouse, Miami, Florida, on August 12, 1970. At that time the petitioner's case had been transferred to the Criminal Intelligence Division of the Internal Revenue Service and the agent questioning the petitioner was a special Criminal Internal Revenue Agent. There was also present at this interview a Civil Agent of the Internal Revenue Service. The agent had continually requested that Mr. Brewer grant him an interview and finally the petitioner stated that he would meet him in Miami, Florida, where he thought he could have an attorney present. The Internal Revenue Agent failed to properly advise the defendant of his constitutional rights.

At the outset the petitioner had made it clear that he desired an attorney to be present before he answered any questions. Internal Revenue Agent stated that he advised him that he was investigating the petitioner's tax liability including the possible failure to file income tax returns and that he would like to ask him some questions; however, that he must first advise him that under the Fifth Amendment to the Constitution of the United States, he could not compel the

petitioner to answer any questions or submit any information, if any such question or answer tended to incriminate him. He further testified that he told the petitioner that he could seek the assistance of an attorney. However, the record reflects that the petitioner had wanted an attorney present from the outset and this was made known to the Internal Revenue Service Special Agent.

The Special Agent did not inform the petitioner that he was a subject of a criminal investigation nor did he inform him that he could have an attorney appointed to represent him if an attorney could not be obtained. He did not inform him that he would continue the interview until the petitioner's attorney was available or one could be obtained.

At the trial, the petitioner sought without success, to have the trial judge hold a hearing out of the presence of the jury to prove that the statements to the Revenue Agents were given without the proper warnings and that there was not a positive and knowlcdgeable waiver of his constitutional rights. Trial judge stated into the record that the purported advising of the rights was not adequate under *Miranda* but refused to grant an Evidentiary Hearing outside the presence of the jury since he did not believe the defendant was even entitled to be advised of his rights in the first place because he was not in actual physical custody. The trial court denied the motion to suppress the statements of the petitioner on the basis that defendant was not in custody and, therefore, a *Miranda* warning was not required. There was a typewritten memorandum of the interview transcribed and throughout it reflected that the petitioner would state to the agent that he thought he ought to have legal counsel before he answered the questions. Even after this the agent would con-

tinue to question the defendant. The evidence shows that special agent would continue to question the petitioner and petitioner would finally respond stating, "Don't hold me to my answers." The agent never informed him that he was holding him to his answers and anything he said was going to be used against him. The trial court did not make a determination of whether there was a positive and intelligent waiver of rights. He refused to grant the petitioner's request for an evidentiary hearing on his motion to suppress since he felt that *Miranda* warnings were not applicable in this situation. The petitioner did not testify at the trial.

REASONS FOR GRANTING THE WRIT

1. The Decision Below is in Conflict with The Decisions of this Court and with the Decisions of other Courts of Appeals.

The decision of the Tenth Circuit Court of Appeals affirming petitioner's conviction on three of the counts erroneously reflects that warnings in accordance with *Miranda v. Arizona* 384 U.S. 436, 86 S.Ct. 1602, L.Ed. 694, only need be given in a case or situation in which a person has been a victim of coercive surroundings, conditions, and atmosphere. Apparently they equate this with actual physical custody of the individual.

If the *Miranda* warnings are required to be given a taxpayer by a Special Criminal Agent of the Internal Revenue Service at the inception of his first contact with the taxpayer once the case has been transferred to the Criminal Intelligence Division of the Internal Revenue Service, the opinion of the Tenth Circuit Court of Appeals is totally con-

trary to the express language of *Miranda*. In *United States v. Dickerson*, 413 F.2d 1111 (7 Cir. 1969), the appellate court held that the *Miranda* warnings must be given and upheld the trial court's suppression of the documentary and oral evidence obtained by the revenue agent and the special agent from the taxpayer and the court stated at page 1116 and 1117:

> "Our conclusion is that *Miranda* warnings must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division. We have reached this conclusion on the basis of our examination of the circumstances surrounding criminal tax investigations generally, and we find the objective circumstances of such confrontation with government authority warrant the above warnings without regard to the individual taxpayers subjective state of mind."

The evidence in the case at bar is undisputed that the petitioner's case had been transferred to the Criminal Intelligence Division of the Internal Revenue Service. The agent interviewing the petitioner was a Special Criminal Agent of the Internal Revenue Service. The interview was conducted in a conference room in the Federal Courthouse, Miami, Florida. The evidence further reflects one of the reasons the conference was held in Miami is that the defendant had an attorney there that he wanted to be present. At this point the petitioner had indicated he wanted to consult an attorney before speaking. Upon meeting the special agent petitioner informed him that his attorney was unavailable. Petitioner was not informed that he could have

an attorney appointed to represent him if an attorney could not be obtained which is required by *Miranda*. Nor was the petitioner informed that the interview could be postponed until his attorney became available.

The Internal Revenue Special Agent commenced questioning the defendant and illicited incriminating information which was later introduced at trial over the petitioner's objections. As this court stated in *Miranda*, supra, 384 U.S. at 445, 86 S.Ct. at 1612.

> "If (the accused) indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning."

In the case at bar, petitioner had informed the Internal Revenue Special Agent that he wanted an attorney present at the conference in Miami, Florida. The United States Court of Appeals for the Tenth Circuit recognized this in their opinion. The opinion of the Tenth Circuit Court of Appeals further directly ignores the express language of *Miranda*, supra, wherein this court stated at 86 S.Ct. at 1628:

> "If the individual states he wants an attorney, the interrogation must cease until an attorney is present."

This court in *Mathis v. United States*, 391 U.S. 1, 88 S.Ct. 1503, noted that tax investigations frequently lead to criminal prosecutions and this court applied *Miranda* to an interrogation of a taxpayer incarcerated for an unrelated offense even though the government contended that the questions were asked as a part of a routine tax investigation

where criminal procedings might never be brought. Counsel for petitioner contends that based on the examination of the circumstances surrounding criminal tax investigations generally, and the objective circumstances of such confrontations with governmental authority warrants that *Miranda* warnings be given without regard to the individual taxpayers subjective state of mind and without regard as to whether the taxpayer is in actual physical custody. Counsel for petitioner contends that this court should rule on this issue and settle the conflict once and for all.

In the case at bar the trial court did not find that the petitioner had waived his rights knowingly and intelligently before he admitted the petitioner's statements into evidence. At the trial counsel for petitioner sought, without success, to have the trial judge hold a hearing out of the presence of the jury to prove that the statements to the revenue agents were given without the proper warnings and that there was not a positive and knowledgeable waiver of his constitutional rights. In *Miranda*, supra, this court stated at 86 S.Ct. at 1628:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain or appointed counsel."

The Honorable Trial Judge did not grant an evidentiary hearing on the defendant's motion to suppress as he felt that *Miranda* was not applicable because the petitioner was not in actual physical custody at the time. Therefore, he did not make a determination of whether there was a positive and intelligent waiver of rights which is required by *Miranda*.

The evidence in the case at bar clearly reflects that there could not have been a positive and knowledgeable waiver which is required by *Miranda*. The Internal Revenue Special Agent would continually question the petitioner and the petitioner would finally respond usually stating "Don't hold me to my answers." It is quite apparent that the petitioner did not realize that whatever he said would be used against him. It is obvious that he was under the impression that the agent would not hold him to his answers. The agents did not follow this with a statement that anything the petitioner said would be used against him. Instead, they led him to believe that he could make these statements and they would not use them against him. Clearly the petitioner did not intelligently and understandingly waive his privilege against self-incrimination and his right to retained or appointed counsel.

An interview conducted in the manner set out above was absolutely contrary to the standard set out by the Supreme Court in *Miranda* wherein the court stated at 86 S.Ct. page 1627:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown the he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than a product of compulsion, subtle or otherwise."

Gaining information as was done here by leading the defendant to believe they would not hold him to his answers is a classic example of gaining information through subtle compulsion. It should be noted that the trial judge upon

viewing a typewritten transcription of the interview between the petitioner and the Internal Revenue Agent stated into the record that the warning was inadequate, if the man was in custody.

There can be no doubt in the case at bar that the government did not meet their burden by failing to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Therefore, the statements of petitioner, and the evidence obtained or resulting therefrom, should be suppressed.

CONCLUSION

For the reason stated herein, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM, 1973

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	No. 73-1102
JAMES WESLEY BREWER, *Defendant-Appellant.*	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
[D. C. No. Cr. 72-222]

John Baum (Joe Roselle, on the brief), for Defendant-Appellant.

O. B. Johnston III, Assistant United States Attorney (G. Phil Harney, Attorney, Chief Counsel Office, Internal Revenue Service and William R. Burkett, United States Attorney, on the brief), for Plaintiff-Appellee.

Before SETH, JONES,* and DOYLE, United States Circuit Judges.

DOYLE, Circuit Judge.

Defendant-appellant has here appealed his convictions on charges of failure to file income tax returns for the years 1967, 1968, 1969 and 1970 contrary to 26 U.S.C. § 7203.

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* Of the Fifth Circuit, sitting by designation.

His contentions are:

First, that the trial court erred in overruling his motion to suppress.

Second, that the verdict is not supported by sufficient evidence on the issue of his place of residence.

Third, that the district court lacked both jurisdiction and venue.

Fourth, that the instruction on venue and jurisdiction was erroneous.

Fifth, the the evidence was particularly insufficient as to Count four.

Virtually all of the defendant's contentions revolve around the trial court's ruling that the statements of defendant-appellant to the special Internal Revenue agent were admissible. Defendant maintains that his constitutional rights were violated because of the inadequacy of the warning given by the agent pursuant to Miranda v. Arizona, 384 U.S. 436 (1968).

The interview in question was conducted at the Federal Courthouse in Miami, Florida on August 12, 1970. Before the interview the agent advised defendant that under the Fifth Amendment the agent could not compel defendant to answer any questions or furnish any information if such answers or information tended to incriminate him. Defendant was also told that any statements or information provided could be used against him in a criminal proceeding. He was also told that he was entitled to the assistance of counsel, but he was not told that he could have an attorney appointed to represent him if an attorney could not be obtained. It was this latter deficiency which is stressed as the factor which rendered the statements inadmissible. The trial court denied the motion to suppress the statements on the basis that the defendant was not in custody and, therefore, a *Miranda* warning was not required.

The facts are that prior to the interview with the defendant in Miami, the agent had tried to interview him in Oklahoma City. The defendant had actually insisted that the meeting be in Florida on the basis that he had two attorneys

in Miami who could be present. The agent agreed to the Florida interview and also agreed to the defendant's condition that he reserved the right to invoke his constitutional rights and decline to answer any question on the basis that he desired to confer with counsel before answering. Admittedly the defendant was free to leave at any time during the interview.

The circumstances here present no violation of the doctrine of Miranda v. Arizona, *supra*. We are not dealing with a case in which a person has been the victim of coercive surrounding conditions and atmosphere. Instead the defendant fixed the terms and conditions of the interview and stated that he had counsel available and would reserve his answers until he had consulted his lawyers. Since he had lawyers, and since his right to consult them was conceded, we see no necessity for the agent's warning him as to his right to have counsel appointed. *See* Miranda v. Arizona, *supra*, at 473 n.43; United States v. Merrick, 464 F.2d 1087, 1091 (10th Cir. 1972); United States v. Montos, 421 F.2d 215, 223 (5th Cir.), *cert. denied*, 397 U.S. 1022 (1970); United States v. Messina, 388 F.2d 393, 395 (2d Cir.), *cert. denied*, 390 U.S. 1026 (1968).

Next we consider the point that the evidence is insufficient to establish that defendant's legal residence was 2204 Southwest 71st Street, Oklahoma City, Oklahoma, the place where his wife and children resided. Ordinarily criminal prosecutions must be brought in the district in which the offense was committed, and federal income tax returns must, by statute, be filed in the place of legal residence of the taxpayer or at a service center serving that district, 26 U.S.C. § 6091 (b)(1)(A)(i) and (ii), or the principal place of business of the taxpayer. The prosecution must then establish beyond a reasonable doubt that the defendant's residence in this, a tax case, was Oklahoma City. This is essential to establish jurisdiction and venue. United States v. Gorman, 393 F.2d 209, 213-14 (7th Cir.), *cert. denied*, 393 U.S. 832 (1968); Yarborough v. United States, 230 F.2d 56, 58-9 (4th Cir.), *cert. denied*, 351 U.S. 969 (1956); Bowles v. United

States, 73 F.2d 772, 773-74 (4th Cir. 1934), *cert. denied*, 294 U.S. 710 (1935); United States v. Commerford, 64 F.2d 28, 32-3 (2d Cir.), *cert. denied*, 289 U.S. 759 (1933). *See also* United States v. Lombardo, 241 U.S. 73 (1915); Weaver v. United States, 298 F.2d 496 (5th Cir. 1962).

The term "residence" has been equated with domicile. *See* Pietro Crespi, 44 B.T.A. 670, 674 (1941); Samuel W. Weis, 30 B.T.A. 478, 486 (1934); L. B. Peeples, 27 B.T.A. 879, 882 (1933); Gates v. Commissioner, 199 F.2d 291 (10th Cir. 1952). This requires residence and intention to remain, and intention is a highly important element. *See* Gates v. Commissioner, *supra*. Here the prosecution relied upon the defendant's statements in which he gave his Oklahoma City address as his permanent one. He made this statement in a deposition to the Securities and Exchange Commission in 1968 and also to the Miami Police in the course of a homicide investigation, and he gave it to the magistrate on the occasion of his appearance in this case. He, together with his wife, owns the property at the Oklahoma City address. Admittedly the defendant was not shown to have resided in Oklahoma City on a continuous basis. He did visit there on occasion. He was also shown to have owned a house in Florida where he conducted his business. From a review of the conflicts in the evidence, it was open to the jury to determine that his residence was indeed in Oklahoma City. *See* District of Columbia v. Murphy, 314 U.S. 441, 455-58 (1941). We must view the evidence now in a light most favorable to the government. *See* United States v. Yates, 470 F.2d 968, 970 (10th Cir. 1972).

We have examined the trial court's jury instruction on this subject and find that it is adequate.

III.

The final point which deserves some comment is the defendant's contention that the evidence was insufficient to establish that he was required to file a return in the year 1970. The only evidence which was offered to establish that

defendant has sufficient income to require the filing of a return was the sale of 2,000 shares of Control Metals Corporation stock and receipt of $17,000 for it plus the distribution of these proceeds, but this does not establish anything more than the fact that the defendant was a person of some means. It fell short of establishing that any part of these proceeds constituted income. It was a capital transaction. Therefore, judging the evidence in a light most favorable to the government, we conclude that it was insufficient. *See* United States v. Schwartz, 390 F.2d 1 (3d Cir. 1968); United States v. Besase, 373 F.2d 120 (6th Cir. 1967); United States V. Fenwick, 177 F.2d 488 (7th Cir. 1949). *Cf.* Holland v. United States, 348 U.S. 121, 137-39 (1954).

The judgment is generally affirmed, but is reversed as to the conviction on count four. The cause is remanded to the trial court with instructions that this count be dismissed. The case is also remanded to the trial court for reconsideration of the sentence imposed in light of the court's decision in respect to count 4.